Supreme Court, U.S.
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No. 09-509

IN THE
Supreme Court of the United States

JUDY JONES,
Petitioner,

v.

VIRGINIA ANDREWS BURDETTE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR REHEARING

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QUESTION PRESENTED

Whether the court of appeals erred in according absolute deference to a Bankruptcy Court's internally inconsistent factual findings contrary to the clear error standard set forth in *Anderson v. City of Bessemer*, 470 U.S. 564 (1985).

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INTRODUCTION

While this Court is not in the business of error correction, it has quite frequently granted summary disposition for those cases where the lower court's decision clearly conflicted with Supreme Court precedent. *See e.g, Wellons v. Hall*, 558 U.S. __ (2010); *Spears v. United States*, 555 U.S. __ (2008); *Moore v. United States*, 555 U.S. __ (2008); *Youngblood v. West Virginia*, 547 U.S. 867 (2006); *Lawrence ex rel. Lawrence v. Chater,* 516 U.S. 163, 167 (1996). Here, the Ninth Circuit's decision according the bankruptcy unlimited deference on internally inconsistent factual findings was clearly erroneous in light of this Court's decision in *Anderson v. City of Bessemer*, 470 U.S. 564 (1985). For this reason, the Court should grant rehearing and the petition for writ of certiorari.

STATEMENT

1. This case involves the issue of whether a transfer of $7,500.00 from a bankruptcy debtor to the petitioner was an avoidable preference within the meaning of the Bankruptcy Act, 11 U.S.C. § 547(b). Under the Act, any transfer of property is subject to review by a trustee. A trustee may avoid certain preferential transfers made from the debtor's estate before the debtor filed a bankruptcy petition. The trustee's power to avoid preferential transfers is designed to further the Bankruptcy Code's central policy of equality of distribution: "creditors of equal priority should receive pro rata shares of the debtor's property." *Begier v. IRS*, 496 U.S. 53, 58 (1990). Additionally, by preventing the debtor from favoring certain creditors over others and by ensuring an equal distribution, the preference provision helps

reduce "the incentive to rush to dismember a financially unstable debtor." *In re Smith*, 966 F.2d 1527, 1535 (7th Cir.) (citations omitted), *cert. dismissed, Baker & Schultz v. Boyer*, 506 U.S. 1030 (1992).

Not all debtor transfers of property in the months leading up to filing a bankruptcy petition are covered under the Act. Indeed, section 547(b) provides that a trustee may only avoid a transfer of a debtor interest in property if the transfer meets five requirements: (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made on or within 90 days before the date of the filing of the petition; and (5) enables the creditor to receive more than such creditor would if the case were a case under Chapter 7, the transfer had not been made, and the creditor received payment of such debt to the extent provided by the provisions of the Code.

The trustee has the burden of proof to establish all elements of § 547(b) by a preponderance of the evidence. 11 U.S.C. § 547(g). The Bankruptcy Act presumes a debtor to be insolvent, as a matter of law, during the 90 days prior to the bankruptcy petition filing date. 11 U.S.C. § 547(f); *see also, Union Bank v. Wolas,* 502 U.S. 151, 155 (1991). This presumption requires the defendant to present evidence to rebut the presumption, but it does not relieve the trustee of the ultimate burden of proof on this third element to establish a prima facie case under § 547(b). *See In re Taxman Clothing Co., Inc.*, 905 F.2d 166, 168 (7th Cir. 1990).

Generally, a trustee proves that a debtor was insolvent when the challenged transfer was made by comparing the debtor's liabilities on the balance sheet against the debtor's assets. For example, if a debtor's liabilities were more than the assets at the time of the transfer, the debtor is considered insolvent at the time of the transfer. Also, if the trustee is able to prove that the recipient of the transfer received more on account of the challenged transfer than it would have recovered in a chapter 7 liquidation then the transfer is an avoidable preference.

2. The debtors, Theodore Jacob Prince and Donna Marie Prince, filed a petition for chapter 7 bankruptcy on January 3, 2001. The Bankruptcy Court in Seattle, Washington, appointed Virginia Burdette trustee of the bankruptcy proceedings.

Petitioner Judy Jones (debtor Theodore Prince's sister) loaned debtors $7,000.00 on or around October 11, 1999, because debtors were in financial hardship. Petitioner's husband, Jerry Jones, also loaned the debtors $8,000.00.

The debtors repaid Jerry Jones $8,500.00 on May 15, 2000, but were unable to pay petitioner until June 12, 2000. The $7,500.00 check to petitioner cleared the bank on June 26, 2000, which is significant, given that avoidable preferences are determined based upon the date the check is honored by the bank. *Barnhill v. Johnson*, 503 U.S. 393, 394 (1992).

The trustee began adversarial proceedings against petitioner and her husband to recover loan re-payments on January 28, 2002. Trustee argued that

the payments were preferential transfers under § 547(b) and § 550. During the course of the adversary proceedings, a district court reversed the findings of the Bankruptcy Court, concluding that the debtors were solvent when payment was made to petitioner's husband. Thus, the only issue left to determine was whether the debtors were solvent on June 26, 2000—the day the check payable to petitioner was honored by the bank.

The Bankruptcy Court conducted a trial where the trustee presented the testimony of Michael Peters—a realtor who addressed the value of the debtors' real property. Mr. Prince testified in support of the petitioner and stated that the Bankruptcy Court should include furniture as personal property assets and tools as part of his business inventory.

The Bankruptcy Court issued an oral ruling at the conclusion of trial. The Court determined that the value of the debtors' property at the time of the transfer was $245,000.00. App.31. However, the court later held that the "the value of Debtors' residence on June 26, 2000 was $265,000.00." Pet. App. 21.

The Bankruptcy Court issued supplemental findings of fact and conclusions of law that calculated the debtors' liabilities on June 26, 2000, at $282,035.99. The court calculated the total assets at $281,399.86. Therefore, the court concluded that debtors were insolvent by $616.13 at the time of the transfer and the $7,500.00 check was an avoidable preference. The court then entered a judgment against petitioner.

In a motion for reconsideration, petitioner argued that the debtors' liabilities should have been reduced for a check sent to creditors that cleared the bank on June 19, 2000. Petitioner also argued that debtor's testimony could not reject in its entirety by the bankruptcy court in calculating debtors' assets. But the court denied the motion in a one-page order. Pet. App.27.

3. The United States Bankruptcy Appellate Panel of the Ninth Circuit reviewed the Bankruptcy Court's finding that debtor was insolvent on the date the $7,500.00 transfer was made to petitioner. The court first noted the highly deferential standard of review for findings of insolvency. Pet. App.11. The court concluded that while the lower bankruptcy court had rejected Theodore Prince's testimony in its entirety, the finding was not clearly erroneous even though the Bankruptcy Court had not specifically found that either the inventory or tools did not exist. Pet. App.15-16. The court also held that the Bankruptcy Court had not abused its discretion in denying the motion for reconsideration. Although the invoices tending to show that debtor had at least $6,850.00 of inventory was produced at trial, the court believed that it was immaterial as to whether the debtors were insolvent. Pet. App.16.

A panel of the Ninth Circuit also reviewed the Bankruptcy Court's avoidable preference finding. But the Court did so summarily without benefit of oral argument. The Court agreed that the factual findings by the lower court did not amount to clear error, but the court issued no analysis—only a one-sentence conclusion.

A petition for rehearing was filed, but the Ninth Circuit denied the motion on June 25, 2009.

A petition for writ of certiorari was timely filed but on January 11, 2010, it was denied.

ARGUMENT

The Court should grant rehearing and issue a GVR (grant the writ, vacate the judgment below, and remand the case) order in light of *Anderson v. City of Bessemer*, 470 U.S. 564 (1985) because the lower court's opinions conflicts with that decision.

This Court has on many occasions explained why summary disposition can benefit both the parties and the Court. This Court has noted that in appropriate cases, "a GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary consideration, assists the court below by flagging a particular issue that it does not appear to have fully considered, assists this Court by procuring the benefit of the lower court's insight before we rule on the merits, and alleviates the potential for unequal treatment that is inherent in our inability to grant plenary review of all pending cases raising similar issues." *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam) (quotation and citation omitted). In *Youngblood v. West Virginia*, this Court issued a GVR where the lower court failed to consider a federal due process claim that discovery had been erroneously withheld. 547 U.S. 867 (2006). There, the Court noted that if it was to reach the merits of the case, "it would be better to have the benefit of the views of the full Supreme Court of Appeals of West Virginia" on the due process/discovery issue. *Id.* And just this term, the

Court issued a GVR order where the Eleventh Circuit's decision denying federal habeas corpus relief was contrary to *Cone* v. *Bell*, 556 U. S., at ___ (slip op., at 17– 18) (2009). *See Wellons v. Hall*, 558 U.S. __ (2010).

The standard for a GVR order is "appropriate when 'intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the matter." *Wellon*, 558 U.S. at __ (quoting *Lawrence* v. *Chater*, 516 U. S. at 167 (1996)). Petitioner can easily meet this standard.

The court of appeals' decision was erroneous for two reasons. First, it confused a clearly erroneous with a never erroneous standard for reviewing factual findings made by a Bankruptcy Court. Contrary to the court of appeals, this Court has always made clear that while factual findings are reviewed deferentially, they are not above all review. Second, the court of appeals failed to justify the Bankruptcy Court's internally inconsistent findings that while the debtors possessed personal property and inventory, the court could not determine the value of the personal property and inventory. Because the court of appeals decision runs counter to well-established decisions from this Court and those below, the Court should grant the writ and summarily reverse the judgment.

1. The standard for appellate review of trial court factual findings has been covered by this Court many times. The Court has made clear that when an

appellate court reviews factual findings, the review is for "clear error." *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985). Clear error review permits only limited reexamination of factual findings where "the district court's account of the evidence is plausible in light of the record viewed in its entirety." *Id.* at 573-74. The reviewing court may reverse, however, when, although there is evidence to support the finding, "on the entire evidence [the court] is left with the definite and firm conviction that a mistake has been committed." *Id.* at 573 (*quoting United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

While trial court's credibility determinations are accorded even greater deference, they are not beyond review. In fact, a trial court may not "insulate [its] findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness." *Anderson*, 470 U.S. at 575. Thus, reviewing for clear error allows an appellate court to examine the trial court's credibility determinations in light of the evidence in the record as a whole, in order to determine whether the credibility assessment can be reconciled with other evidence: "Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact finder would not credit it." *Id.*

Application of the foregoing principles to the facts of this case lay bare the errors committed by the court of appeals in its employment of the clearly erroneous standard. The court treated the factual findings as if they were beyond reproach. Instead of

actually reviewing the factual findings, the court of appeals simply stated that the lower court did not "clearly error by relying on the bankruptcy schedules, rather than Mr. Prince's testimony, to determine the value of Prince's personal property." Pet. App.2.

To be sure, factual findings are reviewed deferentially, but *some* review must be conducted. By failing to review the evidence as a whole, the court of appeals also failed to conduct the review required by this Court's cases. And had the court of appeals conducted the proper review, it would have found that the bankruptcy court's factual findings were internally inconsistent—a paradigmatic example of clear error. *Anderson*, 470 U.S. at 575.

2. The court of appeals also failed to review the bankruptcy court's internally factual findings. After Prince had testified at trial, the bankruptcy court concluded that Prince had some additional personal property and inventory. Pet. App.32. Nevertheless, the bankruptcy court also concluded that Prince's testimony was so "murky" that the court could not determine the amount of the personal property and inventory. The court therefore relied solely upon the bankruptcy schedules.

The Ninth Circuit Bankruptcy Panel acknowledged the bankruptcy court's internally inconsistent reasoning. The Panel stated that "the bankruptcy court did not specifically find that either the inventory or tools did not exist. Rather, the court found that Ted's testimony regarding the tools and inventory was not credible." Pet. App.32. The Panel also acknowledged that the bankruptcy court had a statement in the record showing that debtors

possessed $5,000.00 in inventory on the transfer date. Pet. App.15. Yet, the Panel concluded that the bankruptcy court did not clearly err when it decided to disregard the testimony on personal property and inventory.

The Bankruptcy Court attempted to shield its bogus factual findings under the umbrella of a credibility determination. But this Court has emphasized that trial courts may not "insulate [their] findings from review by denominating them credibility determinations..." *Anderson*, 470 U.S. at 575. Where trial court credibility determinations are internally inconsistent with the rest of the factual findings, clear error has occurred. *Id.* The court of appeals therefore erred in allowing an internally inconsistent factual finding to stand, because the bankruptcy court simply could not conclude that debtors possessed personal property and inventory, but fail to add the property and inventory to the calculation of solvency.

3. Had the court of appeals actually reviewed the bankruptcy court's factual findings for clear error, the result of the insolvency finding would have been different.

Disregarding the debtors' testimony on personal property and inventory, the bankruptcy court determined that debtors' liabilities exceeded their assets by $613.13 when the transfer to petitioner occurred. If the court had attributed just the $5,000.00 record of inventory that was corroborated by debtor's testimony, the debtors were solvent at the transfer date. And if the bankruptcy court believed inventory was possessed, there was unquestionably enough inventory to cover the

$613.13 difference between solvency and insolvency. Ultimately, if the debtors were solvent at the time of the transfer, the transfer was not an avoidable preference.

It is clear that the court of appeals did not consider this Court's precedents (such as *Anderson*) when reviewing petitioner's claim of factual finding clear error. It is also clear that the court of appeals opinion gave short thrift review of the issue. If the Court is to reach the merits of the case, it would be better to have the benefit of full review by the court of appeals, rather than a one sentence analysis. Thus, the Court should grant a GVR remanding the case for a more comprehensive opinion. *See Youngblood v. West Virginia*, 547 U.S. 867, 870 (2006).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATION OF COUNSEL

I do hereby certify that this petition for rehearing was filed in accordance with Rule 44 and not for delay purposes.

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